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Supreme Court of the United States

OCTOBER TERM, 1930

No. 235

EDWARD F. FLYNN, EXECUTOR OF THE ESTATE OF EDWARD L. FLYNN, DECEASED,

Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, RESPONDENT

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QUINNIPIACK PRESS, INC., NEW HAVEN, CONN.

SUBJECT INDEX

		PAGE
I.	The opinions of the courts below	1
II.	Jurisdiction	1
III.	Statement of the case	1
IV.	Specification of error—Question presented	2
V.	Argument:	
	Summary of argument	2
	POINT I. Under the Federal Employers' Liability Act no right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident, accrues to the personal representative of his estate	3
	(a) Pertinent provisions of the Federal Employers' Liability Act	3
	(b) The nature of the statutory liability in damages to the personal representative provided for by the Act of April 22, 1908, c. 149, §1, 35 Stat. 65, indicates no liability exists unless there is liability to the employee at the time of his death	4
	(c) The same conclusion has been reached under similar statutes	13
	POINT II. The interpretation adopted is fair to all parties	17
	Conclusion	18

TABLE OF CASES CITED

	PAGE
Am. R. R. of Porto Rico v. Didricksen, 227 U. S. 145	8
B. & O. S. W. R. Co. v. Carroll, 280 U. S. 491	5
Baltimore S. S. Co. v. Phillips, 274 U. S. 316	5
British Columbia E. Ry. v. Turner, 49 Can. S. C. R. 470	8
British Electric Railway Company Limited v. Gentile, [1914] A. C. 1034	8, 13
C., B. & Q. R. R. v. Wells-Dickey Trust Co., 275 U. S. 161	9
Engel v. Davenport, 271 U. S. 33	7
Frese, Admx. v. Chicago, Burlington & Quincy R. R. Co., 263 U. S. 1	7
Green v. British Columbia Electric Ry. Co., 12 British Columbia Reports, 199	10
Kelliher v. N. Y. C. & H. R. R. Co., 212 N. Y. 207	14
Littlewood v. Mayor, 89 N. Y. 24	9
Louisville & St. Louis Railroad v. Clarke, 152 U. S. 230	7, 17
Mellon v. Goodyear, 277 U. S. 335	5, 13, 18
Mich. Cent. R. R. v. Vreeland, 227 U. S. 59	5, 6, 7, 10, 13
Northern Pacific Railway Co. v. Adams, 192 U. S. 440	6, 8
Reading Co. v. Koons, 271 U. S. 58	8, 12
Robinson v. Canadian Pacific Railway Co., [1892] A. C. 48	14

Rodgers v. Pennsylvania R. Co., 19 Fed. (2) 522 10
St. Louis, Iron Mountain & Southern Railway Co. v. Craft, 237 U. S. 648 12
Seaboard Air Line Ry. v. Allen, 192 Fed. 480 15
Seaboard Air Line Ry. Co. v. Oliver, 261 Fed. 1 ..... 6, 12
Western Union Telegraph Co. v. Preston, 254 Fed. 229 .. 16
Williams v. Alabama Great Southern Ry. Co., 158 Ala. 396 ..... 9, 14
Williams v. Mersey Docks & Harbour Board, [1905] 1 K. B. 804 13

TABLE OF STATUTES CITED

PAGE

Alabama—Code of 1907, §2486 15

Code of 1896, §1751 14

Civil Code of Lower Canada, §1056 14

Federal Employers' Liability Act—Act of Congress of April 22, 1908, c. 149, §1 (35 Stat. 65) 1, 2, 3, 4, 6, 9, 10, 12, 13, 14

Act of Congress of April 22, 1908, c. 149, §6 (35 Stat. 66) 2, 4, 7, 17

Act of Congress of April 5, 1910, c. 143, §1 (36 Stat. 291) 2, 4, 7, 17

Act of Congress of April 5, 1910, c. 143, §2 (36 Stat. 291) 4, 10, 13

Lord Campbell's Act, 9 and 10 Victoria, c. 93 6, 9, 13, 14, 17, 19

New York—Code of Civil Procedure, §1902 ..... 14, 20

L. 1847, c. 450, §§1, 2 as amended (in part) 9, 14, 20

Pennsylvania—Act of April 15, 1851, P. L. 669, §19 .. 16, 17

Act of April 25, 1855, P. L. 309 17

Act of June 24, 1895, P. L. 236, §2 16

Public Authorities Protection Act, 1893, §1 (a) 13

Other Authorities Cited

Roberts, Federal Liabilities of Carriers, 2nd. ed., §§900, 957 ..... 10, 11

Tiffany, Death by Wrongful Act, 2nd. ed., §24 13

APPENDICES

PAGE

APPENDIX A—
Lord Campbell's Act, 9 and 10 Victoria, c. 93..... 19

APPENDIX B—
New York-Code of Civil Procedure, §1902..... 20
L. 1847, c. 450, §§1, 2 as amended (in part).

Supreme Court of the United States

OCTOBER TERM, 1930

EDWARD F. FLYNN, as Executor of the Estate of EDWARD L. FLYNN, Deceased, *Petitioner*,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

No. 235

BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Opinions of the Courts Below

The Memorandum of Decision on Demurrer of Judge Ells of the Superior Court of New Haven County, State of Connecticut, is to be found at pages 4 to 7 of the Record.

The Supreme Court of Errors of Connecticut found no error. 111 Conn. 196 (R. 9-14).

Jurisdiction of this Court

This Court granted petitioner's application for writ of certiorari on October 14, 1930.

Statement of the Case

Petitioner brought this action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, §1, 35 Stat. 65) to recover damages for pecuniary loss by reason of the death of petitioner's testator (R. 1-3).

The complaint alleges that on December 4th, 1923, Edward L. Flynn was in the employ of defendant at its Cedar Hill Yards, New Haven, Connecticut; that while he and the defendant were engaged in interstate commerce he sustained injuries from which he died on September 1st, 1928 (R. 1, 2). The writ is dated May 15th, 1929 (R. 3).

Defendant demurred to the complaint on several grounds among them being:

(1) that plaintiff's action is barred by the two year provision in the Federal Employers' Liability Act (See p. 4);

(2) that in view of the facts no cause of action for the death of the decedent could ever accrue to the plaintiff (R. 3, 4).

The Superior Court sustained the demurrer finding the complaint insufficient on the ground that no cause of action accrued to plaintiff because none existed for the injury at the time of the death (R. 5-7).

The Supreme Court of Errors confirmed this judgment (R. 14, 15). Chief Justice Wheeler wrote the opinion, the other judges concurring (R. 9-14).

Question Presented

Whether under the Federal Employers' Liability Act of 1908, in an action for a wrongful death occurring more than two years after the accident, any right of action ever accrued to decedent's executor, where the decedent had never brought suit on such accident.

Summary of Argument

Point I—Under the Federal Employers' Liability Act no right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident, accrues to the personal representative of his estate.

(a) Pertinent provisions of the Federal Employers' Liability Act.

(b) The nature of the statutory liability in damages to the personal representative provided for by the Act of April 22, 1908, c. 149, §1, 35 Stat. 65, indicates no liability exists unless there is liability to the employee at the time of his death.

(c) The same conclusion has been reached under similar statutes.

Point II—The interpretation adopted is fair to all parties.

POINT I

Under the Federal Employers' Liability Act no right of action for wrongful death, occurring more than two years after the accident causing the death, where the decedent had never brought suit on such accident, accrues to the personal representative of his estate.

(a) *Pertinent provisions of the Federal Employers' Liability Act.*

The Act of April 22, 1908, c. 149, §1, 35 Stat. 65, reads as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable* in damages *to any person suffering injury* while he is employed by such carrier in such commerce, *or, in case of the death of such employee, to his or her personal representative*, for the benefit of the surviving

widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (italics ours).

The Act of April 22, 1908, c. 149, §6, 35 Stat. 66, read in part as follows:

"That no action shall be maintained under this Act unless commenced within two years from the date the cause of action accrued."

This was amended by Act of April 5, 1910, c. 143, §1, 36 Stat. 291, to read as follows:

"No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The provision for survival of the right of action of the person injured (Act of April 5, 1910, c. 143, §2, 36 Stat. 291) is not involved as the complaint makes no claim for damages on account of injury of the deceased employee.

(b) *The nature of the statutory liability in damages to the personal representative provided for by the Act of April 22, 1908, c. 149, §1, 35 Stat. 65, indicates no liability exists unless there is liability to the employee at the time of his death.*

The foundation of the right of action given to the personal representative "is the original wrongful injury to the decedent." It is true that the measure of damages is for the pecuniary loss

to the relatives dependent, and the measure does not include his damages. *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59, 68, 70. But both rights of action have the common ground of the original wrongful injury of the person. Mr. Justice Lurton said:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." (p. 70).

The liability to the personal representative and the liability to the injured employee go back to the same "group of facts", to use an expression adopted by Mr. Justice Sutherland in *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, at page 321. If there has been an unlawful violation of the right of bodily safety the injured employee has a right of action for loss and suffering. If there has been an unlawful invasion of a right not to be damaged pecuniarily the personal representative has a right of action for pecuniary loss of certain beneficiaries. The origin of both is the same wrongful act or neglect, and the consequent injury to the decedent. It is true that the two claims are distinct and one begins where the other ends. Recovery upon both claims is a single recovery for a single wrongful act, single tort. *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 494, 495, and cases cited. The common origin principle is recognized by Judge Ells in his memorandum decision, and he applies the reasoning of this Court in *Mellon* v. *Goodyear*, 277 U. S. 335, and takes its statements at their face value (R. 5, 6).

Beside a common origin we find a continued close relationship between the two causes and two resulting rights of action. In *Mellon* v. *Goodyear*, *supra*, a settlement was made with the injured employee who accepted the agreed sum. There-

after he died, and his dependents brought suit for their pecuniary damages through his death. It was held that a release by the injured employee was a defense to any action for his death. While the decision may be placed on the narrow ground of only one recovery within contemplation of the statute, this Court used this broad language:

> "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury." (p. 344).

Certain parts of the opinion of Circuit Judge Walker in *Seaboard Air Line Ry. Co.* v. *Oliver*, 261 Fed. 1 (Circ. Ct. of Appeals, 5th. Circ.) have interest for us. In that case Hall had recovered a judgment and satisfaction by payment for injuries which later resulted in his death. His personal representative brought an action under the Federal Employers' Liability Act of 1908. The opinion concludes that under the statute the two rights of action are given disjunctively, that when the injured employee has died without having enforced his right of action only one recovery is allowed, and so, by inference, the opinion says, when the injured employee has enforced his right of action the personal representative has no right of action to enforce. Not only are the two rights based upon a single tort, but their continued existence "is dependent upon conduct of the employee at the time of, or subsequent to, the injury." (p. 3).

Not only a release by the injured employee and satisfaction, not only a satisfied judgment, but an agreement of non-liability by the injured person prior to the accident may bar an action for his death. *Northern Pacific Railway Co.* v. *Adams*, 192 U. S. 440. While mere existence of a right of action in the employee does not bar the right of action for death (*Mich.*

Cent. R. R. v. *Vreeland, supra*) the latter right depends upon the continued existence of the former right. If it ceases to exist through any cause the representative's right of action does not come into existence. A fortiori if no cause of action ever existed in the employee none can accrue to the personal representative. *Frese, Admx.* v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1. What an unusual situation would obtain if the employer ceased to be liable to the employee by lapse of time, and after an indefinite period, during which no cause of action existed anywhere, a new cause of action sprang into being solely because of the employee's death.

Unquestionably the limitation of time in the Federal Employers' Liability Act operates as an extinguishment of liability, and does not apply to the remedy only. *Engel* v. *Davenport*, 271 U. S. 33. This would seem to make the time element just as important, in a consideration of liability, as a judgment or settlement.

Under a statute of Indiana it was provided "the action must be brought within two years." In *Louisville & St. Louis Railroad* v. *Clarke*, 152 U. S. 230, it was held that the statute gave the personal representative two years in which to sue, that he could not sue until the cause of action accrued, and that the cause of action did not accrue until the person injured died. The accident occurred November 25th, 1886, the death February 23rd, 1888. Action was brought April 28th, 1888. The action of the injured person was not barred, the old rule of a year and a day not applying.

Again we come across broad language:

> "The right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by

> the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent, immediately before his death, to have maintained an action on account of such act or omission." (p. 238).

In discussing the nature of the liability we have mentioned the differences in the measure of damages, the creation of a new and distinct right of action for the benefit of the named dependent relatives. *Am. R. R. of Porto Rico v. Didricksen*,, 227 U. S. 145, at page 149. Furthermore, the two years do not begin to run until the date of death which is the date of accrual of the cause of action. *Reading Co.* v. *Koons*, 271 U. S. 58. But the real and only question is whether any right to bring an action existed in the personal representative when it did not exist in the deceased. To approach the problem from this correct angle makes unnecessary a discussion of Point A of petitioner's brief in support of the petition (pp. 14-16), and of Point C (pp. 18-21).

If there is no omission of duty to the decedent, can it be said that there is any duty owing to the designated beneficiaries? Can the personal representative, on behalf of the designated beneficiaries, recover even though the deceased could not have recovered damages had he not been killed? "The company is not under two different measures of obligation— . . ." *Northern Pacific Railway Co.* v. *Adams, supra,* at page 450.

"I find no satisfactory ground of distinction between the extinguishment of the cause of action by the injured man by an accord and satisfaction, evidenced by a release, and its extinguishment by the recovery of a judgment upon it or the expiry of a period of limitation." *British Columbia E. Ry.* v. *Turner*, 49 Can. S. C. R. 470, 496. (Quoted with approval in *British Electric Railway Company Limited* v. *Gentile*, [1914] A. C. 1034, at p. 1042).

Loss of a right by mere failure to act within a certain time is illustrated by *C., B. & Q. R. R.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161. It will be recalled that one Anderson was killed instantly. His mother survived but died without any action having been brought on her behalf, and the administrator sued for the benefit of a sister. It was held that the sister was not entitled to compensation.

Chief Justice Wheeler, writing the opinion of the Supreme Court in our case, said:

> "We discover no distinction between a judgment, or a settlement obtained by the decedent, and the lapse of the statutory period, in barring the maintenance of an action under this Act." (R. 14).

Without citation of authority we can say that except for the statute there would be no liability in the event of death. It is the obvious intent of the statute to provide that the death of the party injured shall not free the wrong-doer. But this is the only defense of which the statute intended to deprive the wrong-doer (see opinion of Judge Rapallo in *Littlewood* v. *Mayor*, 89 N. Y. 24, construing the New York Laws of 1847, c. 450, §§1, 2, and considering it to be substantially like Lord Campbell's Act, 9 and 10 Victoria, c. 93). This singleness of purpose appears in the Federal Employers' Liability Act itself, "in case of the death of such employee."

Also as a matter of statutory construction we say that attached to the right of action by the personal representative there is the implied statutory condition that, at the time of the death, the employee had a right of action that could be enforced. This is the method of approach of *Williams* v. *Alabama Great Southern Ry. Co.*, 158 Ala. 396, construing another act. Again, it would involve forced construction, in the absence of express

language, to hold that the Act intended to create a liability to the dependents when there was none to the deceased at the time of his death. See *Green* v. *British Columbia Electric Ry. Co.*, 12 British Columbia Reports, 199.

The Act indicates an intent to name a definite period of limitation. It does not indicate an intent to name the date of death as the beginning of the period if there has been a bar by lapse of time, and not any date if there has been a release with payment or a satisfied judgment or a contract.

As direct authority for our general position we refer to *Rodgers v. Pennsylvania R. Co.*, 19 Fed. (2d) 522 (Dist. Ct., E. D. New York, 1927). Deceased, injured November 10, 1922, died February 4, 1925, more than two years later. On December 2, 1926, the administratrix sued under the Federal Employers' Liability Act for conscious pain and suffering of the deceased, and for pecuniary loss suffered by reason of the death. District Judge Moscowitz held that plaintiff could not recover on either cause of action because nothing survived to the representative for the conscious pain and suffering and because deceased could not have maintained an action immediately before his death, relying upon the language of *Mich. Cent. R. R.* v. *Vreeland*, *supra*, particularly pages 68 and 69.

A summary statement of respondent's position is found in Roberts', Federal Liabilities of Carriers, Second Edition, Sections 900 and 957.

Section 900.

"EXTINCTION OF EMPLOYEE'S RIGHT OF ACTION BARS SUIT IN BEHALF OF BENEFICIARIES. But while the two rights of action created by section 1 of the act are entirely distinct to the extent that one is for the wrong to the injured person and is con-

fined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death, yet they originate in a single wrongful act. And as the foundation of the right of action for death is the original wrongful injury to the decedent, so it has been generally held that the action for death is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.

"For these reasons it is held that if the right of action of the injured employee is extinguished during his lifetime, either by failure to bring suit within the statutory period, by recovery and enforcement of judgment, or by compromise thereof with the negligent employer, his beneficiaries will have no right of action for his death. And manifestly such a termination of the employee's right of action, in his lifetime, will preclude the survival of any right of action to the personal representative for the employee's loss and suffering."

Section 957.

"WHERE EMPLOYEE DIES FROM INJURY AFTER HIS RIGHT TO SUE HAS LAPSED. In this connection it may be well to point out that where an employee, injured under circumstances giving rise to a cause of action in his favor under the liability act, survives his injury by more than two years and then dies, as a result of such injury, without having brought suit or receiving satisfaction therefor, his personal representative will have no cause of action for the death, although he brings suit within two years after the death. This result however, is not due to the fact that the suit was not brought within two years after the cause of action for death accrued, because no such cause of action could accrue until

death occurred. It results, on the contrary, from the fact that in the circumstances of the case no cause of action for death could ever accrue, because prior to the possible occurrence of the conditions fixing the carrier's liability for death, the right of action for injury had ceased to exist."

Petitioner claims no right of action for conscious pain and suffering. By failure to sue within two years from the date of injury deceased's right was barred and there could be no survivorship. The petitioner cannot have a single recovery for a double wrong as plaintiff had in *St. Louis, Iron Mountain & Southern Railway Co. v. Craft*, 237 U. S. 648. If allowed a single recovery for a single wrong the resulting situation would be anomalous, offending a uniformity principle mentioned in *Reading Co. v. Koons, supra*, at pages 63 and 64. This anomalous situation is recognized by Chief Justice White in his opinion (R. 14).

Point B of petitioner's brief (pp. 16-18) argues that the Federal Employers' Liability Act does not, in express terms, make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he died. A reading of the Act leads to this obvious conclusion.

Petitioner seems to have in the background the thought that because there is but one recovery, there must necessarily, always, be a recovery.

Petitioner's statement of a great distinction between affirmative extinguishment and extinguishment by lapse of time goes no deeper than the assertion, although he purports to find encouragement in *Southward Air Line Ry. Co. v. Oliver, supra*. We have already discussed this case (respondent's brief, p. 6).

Chief Justice Wheeler recognized a conflicting statement (R. 13). The opinion attempts a distinction between the Federal Employers' Liability Act and Lord Campbell's Act whereas both *Mich. Cent. R. R.* v. *Vreeland*, *supra*, and *Mellon* v. *Goodyear*, *supra*, treat the two as of like nature, ~~essentially~~ identical, at least "insofar as it gives an action for the benefit of dependents." (p. 345 of latter case). Furthermore, the Oliver case was referred to in discussing section 9 as amended in 1910 (Act of April 5, 1910, c. 143, §2, 36 Stat. 291), not section 1 of the 1908 Act (p. 343).

(c) *The same conclusion has been reached under similar statutes.*

According to Tiffany, Death by Wrongful Act, 2nd ed., §23, Lord Campbell's Act creates a new cause of action, as do the statutes of many of the States.

In *Williams* v. *Mersey Docks & Harbour Board*, [1905] 1 K. B. 804, the injury occurred in December, 1902, the death in December, 1904, and action was started in February, 1905. The Public Authorities Protection Act, 1893, §1 (a), provided for action by the injured within six months after the neglect. The action was brought under Lord Campbell's Act. It was held that the representative could not maintain this action unless the deceased could, although as interpreted, the Act gives a totally new action, new in its species, in its qualities, in its principles (see Appendix A, p. 12).

In *British Electric Railway Company Limited* v. *Gentile*, *supra*, we find this language:

> "Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not

taken place. At that moment, however, the test is absolute." (p. 1041).

Petitioner says (brief, pp. 20 and 21) the case of *Robinson* v. *Canadian Pacific Railway Co.*, [1892] A. C. 481, involved a statute similar to the Federal Employers' Liability Act and presented the exact question. It was pointed out in the opinion that the terms of §1056 of the Civil Code of Lower Canada, under which the action was brought, differed substantially from those of Lord Campbell's Act.

In *Kelliher* v. *N. Y. C. & H. R. R. R. Co.*, 212 N. Y. 207, plaintiff's interstate was injured in November, 1906, and died in February, 1912. Within a few months the administratrix brought an action. The Court of Appeals held that where an action could not have been brought by the decedent because not brought within three years after accrual, it could not be maintained for the same accident by his representative. In Appendix B we have printed the pertinent parts of the statute, Code of Civil Procedure, §1902; L. 1847, c. 450, §§1, 2; L. 1849, c. 256; L. 1870, c. 78; L. 1909, c. 221; L. 1915, c. 620.

For Alabama we refer to two cases. In *Williams* v. *Alabama Great Southern Railway Co.*, *supra*, the injury occurred July 15, 1901, intestate died September 1, 1903, the action was begun October 4, 1904. Williams did not sue for his personal injuries. Suit was brought under Section 1751 of the Code of 1896 reading as follows:

> "Personal Representative may Sue, if Injury Results in Death.—If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

The court said:

> "'But the measure of the administrator's right to have the employer declared responsible towards him is to be ascertained by the rights the deceased himself had against the employer.' And it seems to us the correct construction of the statute to say that there is attached to the administrator's right of action the implied statutory condition that, at the time of the employe's death, he had a right of action which could be enforced. If his right was then gone, or if his right was then barred, the administrator has no claim. 'The statute extends the remedy to the administrator, but does not revive the defendant's liability if it had been extinguished. It simply gives him the right to avail himself of the right of action the deceased had at his death', and it is given for the same wrongful act or neglect. That is the essential foundation of the action in either case. The wrong to be redressed is the same in both cases." (pp. 400, 401).

In *Seaboard Air Line Ry.* v. *Allen*, 192 Fed. 480 (Circ. Ct. of Ap., 2nd: Circ., petition for writ of certiorari denied, 226 U. S. 612), Scott, employee of defendant, was injured November 17, 1904, died August 11, 1908. The action was begun July 29, 1910, under section 2486 of the Civil Code of Alabama (vol. 2 of 1907) reading in part as follows:

> "A personal representative may maintain an action and recover such damages as the jury may assess, for the wrongful act, . . . of any . . . corporation, . . . whereby the death of his . . . intestate was caused, if the . . . intestate could have maintained an action for such wrongful act, . . . if it had not caused death; . . . Such action must be brought within two years from and after the death of the . . . intestate."

It was contended that the action could not be maintained because Scott had not brought an action within the prescribed one year period.

Circuit Judge Lacombe put this question:

> "Is this ability to maintain an action to be considered, as the words would seem to indicate, as an ability so to do at the time when the statutory cause of action arises, viz., at the moment of death?" (p. 481).

The opinion argues that if the court considers only the original negligence and the subsequent death then recovery of judgment or settlement would be no defense. Yet it is generally agreed that both judgment and settlement are defenses even though they are not payments for the same thing. It was held that because deceased did not have a right of action at the moment of death the personal representative could not maintain the action.

Because of its marked difference the interpretation of the Pennsylvania statute is illuminating. *Western Union Telegraph Co. v. Preston*, 253 Fed. 229 (Circ. Ct. of Appeals, 3rd. Circ.; certiorari denied in 248 U. S. 585; same case in 246 Fed. 543, 250 Fed. 189) was decided on the express language creating a liability to the beneficiaries when there was none to the deceased at the time of death because the personal injury suit had not been brought within two years as provided by Act of June 24, 1895, P. L. 236, section 2.

Preston, injured in September, 1905, died in October, 1915. He brought no suit during his life but his widow brought an action, within one year after his death, under the statutes of Pennsylvania. These read:

> "Whenever death shall be occasioned by unlawful violence or negligence, *and no suit for damages be brought by the party injured during his or her life*, the widow of any such deceased, or if there be no widow, the personal representative may maintain an action for

and recover damages *for the death* thus occasioned." Act of April 15, 1851 (P. L. 669) §19 (italics ours).

"The declaration shall state who are the parties entitled to such action; the action shall be brought within one year after the death, and not thereafter." Act of April 25, 1855 (P. L. 309).

The opinion refers to Lord Campbell's Act and similar American statutes as giving a new right of action, founded on a new grievance. The cause of action is the tort which produced the death. The right depends primarily on the liability of the wrong doer to the employee. Liability may be destroyed by the act of the deceased—assumption of risk, contributory negligence, release, etc. The opinion says, referring to its own case, that the husband had simply permitted a statute of limitations to deprive him of his right to sue upon it and the tort that occasioned the death still existed. Thus a further ground of distinction from the instant case is suggested, since the limitation period prescribed in the Federal Employers' Liability Act operates to extinguish the tort and cause of action and does not merely bar the right to sue upon it.

We have discussed the Indiana statute under Point I, (b), pages 7 and 8. If there had been a limitation on the time to sue for personal injuries in *Louisville & St. Louis Railroad* v. *Clarke, supra*, we would have the problem presented in the case at bar.

POINT II.

The interpretation adopted is fair to all parties.

"This is not an unjust result . . . It is fair that their claim, although different in nature and principle should be dependent on the existence of a right in the injured person at the time he died . . . All this is fair and just, even liberal.

But to go on and say that a man could be injured and make no claim and when he died forty years later allow his family to assert that his death resulted from the injury and that they should be compensated would do violence to the purposes of the statute of limitations."

Memorandum of decision on demurrer, Judge Ells, R. 6.

"Ill consequences to both employees and employers" would follow the adoption of a contrary view (*Mellon* v. *Goodyear*, *supra*, at page 345). This interpretation carries out the general purposes of the statute, with fair, practical results, without resort to technical distinctions.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

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FLEMING JAMES, JR.,
Of Counsel.

APPENDIX A

Lord Campbell's Act, 9 and 10 Victoria, c. 93.

Section 1. Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Section 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, . . . shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

Section 3. Provided always, that not more than one action shall lie for and in respect of the same subject matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

APPENDIX B

New York Code of Civil Procedure, §1902.

L. 1847, c. 450, §§1, 2 as amended (in part).

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left, him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death.